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No. 80-1608

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of evidence obtained following a warrantless entry into respondent's house in the course of arresting him on probable cause, where the entry occurred prior to both this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), and the decision of the Ninth Circuit in *United States* v. *Prescott*, 581 F.2d 1343 (1978).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	8
Argument:	
The decisions requiring warrants for arrest entries into suspects' homes should not be applied to suppress evidence obtained as a result of arrest entries antedating those decisions	11
A. A decision resolving a previously unsettled Fourth Amendment issue should not be applied retroactively	14
B. The arresting agents were not acting in violation of existing constitutional standards	19
C. The fact that respondent's case was pending on direct review when *Payton* and *Prescott* were decided does not justify suppression of the evidence against him	34
Conclusion	38

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165 18
Almeida-Sanchez v. *United States*, 413 U.S. 266 ..... 14, 30, 36
Arkansas v. *Sanders*, 442 U.S. 753 28
Bowen v. *United States*, 422 U.S. 916 36
Brown v. *Florida*, 446 U.S. 902 35
Bush v. *Florida*, 446 U.S. 902 35
Coolidge v. *New Hampshire*, 403 U.S. 443 ..... 20, 26, 31
Desist v. *United States*, 394 U.S. 244 ..... 9, 16, 17, 30, 31, 35
Elkins v. *United States*, 364 U.S. 206 9
Fuller v. *Alaska*, 393 U.S. 80 16

Cases—Continued Page

Gerstein v. *Pugh*, 420 U.S. 103 20
Hankerson v. *North Carolina*, 432 U.S. 233 35
Hill v. *California*, 401 U.S. 797 35
Jack v. *United States*, 387 F.2d 471, cert. denied, 392 U.S. 934 23
Jones v. *United States*, 357 U.S. 493 20
Katz v. *United States*, 389 U.S. 347 31
Linkletter v. *Walker*, 381 U.S. 618 .....8, 16, 17, 19, 32, 35
Mapp v. *Ohio*, 367 U.S. 643 .....16, 17, 19
Michigan v. *DeFillippo*, 443 U.S. 31 19
Michigan v. *Tucker*, 417 U.S. 433 15
Miller v. *United States*, 357 U.S. 301 27
Munoz v. *United States*, 325 F.2d 23 23
Ng Pui Yu v. *United States*, 352 F.2d 626 23
Payton v. *New York*, 445 U.S. 573 .....*passim*
People v. *Privett*, 55 Cal. 2d 698, 361 P.2d 602, 12 Cal. Rptr. 874 26
People v. *Ramey*, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 ..... 26, 27
Rakas v. *Illinois*, 439 U.S. 128 18-19
Steagald v. *United States*, No. 79-6777 (Apr. 21, 1981) 36-37
Stone v. *Powell*, 428 U.S. 465 .....8, 9, 13, 18
Stovall v. *Denno*, 388 U.S. 293 37
United States v. *Blake*, 632 F.2d 731.....7, 10, 23, 25, 26, 28, 31, 32
United States v. *Caceres*, 440 U.S. 741 33
United States v. *Calandra*, 414 U.S. 338 .....9, 13, 17, 34
United States v. *Calhoun*, 542 F.2d 1094 ..... 24, 25
United States v. *Corcione*, 592 F.2d 111, cert. denied, 440 U.S. 975 ..... 27, 28
United States v. *Di Re*, 332 U.S. 581 27
United States v. *Escalante*, 554 F.2d 970, cert. denied, 434 U.S. 362 26
United States v. *Flickinger*, 573 F.2d 1349, cert. denied, 439 U.S. 836 24
United States v. *Gillespie*, No. 81-879 (filed Nov. 10, 1981) 36
United States v. *Havens*, 446 U.S. 620 17
United States v. *Janis*, 428 U.S. 433 ..... 8-9, 18

Cases—Continued — Page

United States v. *Masterson*, 529 F.2d 30, cert. denied, 426 U.S. 908 24
United States v. *McLaughlin*, 525 F.2d 517, cert. denied, 427 U.S. 904 24
United States v. *Payner*, 447 U.S. 727 19
United States v. *Peltier*, 500 F.2d 985, rev'd, 422 U.S. 531 ..... *passim*
United States v. *Phillips*, 497 F.2d 1131 ..... 24, 25
United States v. *Prescott*, 581 F.2d 1343 ..... *passim*
United States v. *Reed*, 572 F.2d 412, cert. denied, 439 U.S. 913 ..... 28, 33
United States v. *Ross*, 655 F.2d 1159, cert. granted, No. 80-2209 (Oct. 13, 1981) 10-11, 28, 29, 31, 33, 36
United States v. *Santana*, 427 U.S. 38 ..... 6, 7, 12
United States v. *Stewart*, 650 F.2d 178 36
United States v. *Tucker*, 610 F.2d 1007 28
United States v. *Watson*, 423 U.S. 411 ..... 12, 20, 27
United States v. *Williams*, 622 F.2d 830, cert. denied, 449 U.S. 1127 15
Williams v. *Gould*, 486 F.2d 547 23-24
Williams v. *United States*, 273 F.2d 781, cert. denied, 362 U.S. 951 23
Williams v. *United States*, 401 U.S. 646 ..... 9, 16, 32, 35

Constitution and statutes:

United States Constitution, Fourth Amendment ..... *passim*
18 U.S.C. 2 2
18 U.S.C. 641 2
18 U.S.C. 1703 2

Miscellaneous:

1 Blackstone, *Commentaries* (15th ed. 1809) 32
Note, *Retroactivity and the Exclusionary Rule: When Do The Policies Underlying The Exclusionary Rule Warrant Its Retroactive Application?*—United States v. Peltier, *422 U.S. 531 (1975)*, 13 Am. Crim. L. Rev. 317 (1975) 29

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 626 F.2d 753. The order amending that opinion (Pet. App. 12a-13a) and the court of appeals' two prior opinions (Pet. App. 14a-22a; *id.* at 23a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on September 2, 1980. A petition for rehearing was denied on December 29, 1980 (Pet. App. 32a). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including March 23, 1981. The petition was filed on that date and was granted on

October 5, 1981 (J.A. 9). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, respondent was convicted of aiding and abetting the obstruction of correspondence, in violation of 18 U.S.C. 1703 and 2. Respondent's sentence was suspended in favor of five years' probation.[1]

1. The evidence at the suppression hearing and at trial showed that on March 30, 1977, Lena Kearney received in the mail an envelope addressed to Elihu Peterson (Tr. 351). Kearney held the envelope up to the light and discovered that it contained a Department of Treasury check for $4,681.41 (Tr. 351). Kearney contacted her sister-in-law, Wynona Wilkins, and the two women decided to attempt to cash the check (Tr. 352-353, 368, 433-434).

Wilkins requested co-defendant Oscar Joe Dodd to assist in cashing the check (Tr. 354, 364-365, 434). The next day, Dodd, respondent and Eugene McCardell went to Kearney's house, where they examined the check and discussed possible ways of cashing it (Tr. 374-375, 520). Respondent picked up the check and made a telephone call. During this call, he discussed the fact that he had a check that he wanted to cash and that the age of the payee,

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[1] Respondent, together with co-defendant Oscar Joseph Dodd, was charged in a two-count indictment with aiding and abetting the obstruction of correspondence, and with receiving stolen government property, in violation of 18 U.S.C. 641. Respondent was convicted on the obstruction of correspondence count but was acquitted on the stolen property count. Dodd was convicted on both counts and appealed; the court of appeals affirmed his conviction in a separate opinion.

which was shown on the check, would make it difficult to cash (Tr. 377, 412-413). Upon completion of the call, respondent turned to Dodd and McCardell and announced that he believed he had located someone who could assist them in cashing the check (Tr. 377, 384-385). The three men then left Kearney's house with the check in their possession (Tr. 387, 482, 669).

Thereafter, in the course of investigating this matter, Special Secret Service Agent Richard J. Hemenway interviewed Lena Kearney, who revealed details of respondent's participation in the scheme to negotiate the check (Tr. 258, 259). She related that respondent, whom she identified from a photo spread, had been present at the March 31 meeting at her house and had participated in the discussion of the plans for cashing the check. She also stated that respondent had made a telephone call in an attempt to find someone to cash the check (Tr. 138-139, 258-259, 472). Wynona Wilkins confirmed that respondent had been present at the March 31 meeting at Kearney's house and that there had been a discussion with respect to the possibility and difficulties of cashing the check (Tr. 438-441). In addition, Wilkins informed Agent Hemenway that co-defendant Dodd could be reached by calling respondent's telephone number. Further investigation revealed that respondent and Dodd were classified as associates in the criminal history files of the Los Angeles Police Department (Tr. 471-472).

On May 5, 1977, at about 6:00 p.m., Agents Hemenway and Pickering went to respondent's house to question him about his role in the check cashing scheme (Tr. 115, 140). Although the agents had obtained a warrant for Dodd's arrest, they had not obtained one for respondent (Tr. 139). After watch-

ing the residence for a short time the agents observed respondent's car pull into his driveway and the two occupants of the car enter respondent's residence (Tr. 498). The agents then approached the front door and drew their weapons, pointing them downward (Tr. 135, 169, 489-490). Agent Hemenway knocked on the door and identified himself, using a fictitious name (Tr. 504). When respondent opened the door, Agent Hemenway identified himself and Agent Pickering as Secret Service agents and displayed his badge (Tr. 115, 477). Respondent invited the agents into his house (Tr. 182, 477, 491).

Agent Hemenway conducted a brief security check of the house (Tr. 491). After Hemenway asked a woman who was present to come into the living room, the agents holstered their weapons (Tr. 115, 185). Hemenway then asked respondent to step into the bedroom (Tr. 116). After being advised of his constitutional rights, respondent told Agent Hemenway that he was willing to cooperate (Tr. 481). During the ensuing discussion, respondent revealed his involvement in the scheme to cash the Treasury check (Tr. 118, 127). The agents then informed respondent that he was under arrest (Tr. 128, 169). The agents and respondent left the residence and went to the police station, where respondent, after again being advised of his constitutional rights, signed a written statement detailing his involvement in the scheme (Tr. 128-134, 155-161). The check eventually was found in McCardell's vehicle (Tr. 489).

Prior to trial, respondent sought suppression of his oral and written statements as the fruits of an unlawful arrest that was not supported by probable cause. The district court denied respondent's motion, finding that, even though they initially did not have

probable cause to arrest respondent, the agents acted properly in going to respondent's house to question him about the crime (J.A. 7). The court further found that respondent had not been arrested until after he voluntarily admitted his participation in the check cashing scheme, and that at that point the agents had probable cause to arrest him (*ibid.*).

2. On respondent's appeal, the court of appeals initially affirmed his conviction. In its first opinion, filed on December 19, 1978 (Pet. App. 23a-30a), the court concluded that, even though the agents testified that they had not intended to effect an arrest when they initially entered respondent's residence, "[respondent's] arrest occurred immediately upon the entry of the agents into [respondent's] home" (*id.* at 26a).[2] While diverging from the reasoning of the district court, the court of appeals nonetheless concluded that the motion to suppress respondent's statements had been properly denied because the agents had probable cause to arrest respondent prior to their entry. While noting that "[i]t certainly would have been preferable had the agents obtained a warrant" for respondent's arrest before entering his residence, the court held that "if probable cause exists for the arrest, [respondent's] constitutional

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[2] The court reasoned that, regardless of the agents' subjective intentions, the determination whether an arrest has occurred depends upon an objective "evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved" (Pet. App. 25a-26a). In light of the facts that the agents were armed when they entered respondent's house and that their weapons remained drawn while one of the agents remained with respondent and the other searched the house, the court concluded that "a reasonable person, under those circumstances, would have thought that he was under arrest" (*id.* at 26a).

rights were not violated by the warrantless arrest, even though there may have been time to have obtained a warrant for his arrest" (*id.* at 26a-27a).

On August 20, 1979, the court of appeals issued an amended opinion (Pet. App. 14a-22a) to address the applicability to this case of its decision in *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978), which had held that a warrantless entry into a third party's residence to arrest a suspect on probable cause violated the Fourth Amendment.[3] The court concluded that respondent's arrest occurred, not after the agents' entry into his house, as it previously had found, but prior to the entry, when respondent opened the door "and was first confronted by the agents with their guns drawn" (Pet. App. 17a; see *id.* at 18a). Accordingly, the court held that respondent's subsequent statements were admissible because the arrest was valid under *United States* v. *Santana*, 427 U.S. 38 (1976) (Pet. App. 18a). The court distinguished *Prescott* on the ground that that case involved a forcible entry to effect an arrest, whereas here respondent was arrested in the doorway and the agents' subsequent entry was at respondent's invitation (Pet. App. 18a-19a).

Following this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), the court of appeals issued another opinion, this time reversing respondent's conviction (Pet. App. 1a-11a). The court recognized that, unlike the situation in *Riddick* v. *New York*, the companion case to *Payton*, the agents in this case did not enter respondent's residence prior to effecting his arrest (Pet. App. 7a). Nonetheless,

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[3] Although *Prescott* had been decided on September 14, 1978, prior to the court's first opinion in this case, that opinion made no mention of *Prescott*.

relying on the "strong language" in *Payton* "emphasizing the special protection the Constitution affords to individuals within their homes" (Pet. App. 7a), the court concluded that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the 'reach' of the arresting officers" (*ibid.*). Accordingly, the court held that the warrantless arrest violated respondent's Fourth Amendment rights (*ibid.*).[4] Having determined that the arrest was unlawful, the court went on to hold that even though respondent's confessions were voluntary, they should have been suppressed as fruits of that arrest (*id.* at 8a-11a).

In response to the government's argument, in its petition for rehearing, that the principles of *Payton* should not be applied retroactively, the court of appeals revised its amended opinion to include a footnote explaining that its decision rested on the principles announced in both *Payton* and its own decision in *United States* v. *Prescott*, *supra* (Pet. App. 12a-13a). Although respondent's arrest occurred prior to either of those decisions, the court pointed out that in *United States* v. *Blake*, 632 F.2d 731 (9th Cir. 1980), it had held that the rule of *Prescott* applied retroactively in the Ninth Circuit to arrest entries that occurred prior to *Prescott* (Pet. App. 13a).

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[4] The court sought to distinguish the doorway arrest in this case from that in *United States* v. *Santana*, *supra*, on the ground that respondent did not voluntarily expose himself to public view but rather was induced to open his door when the agents misrepresented their identities (Pet. App. 6a-7a).

SUMMARY OF ARGUMENT

The warrantless entry into respondent's home took place in May 1977, nearly three years before this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), and more than 16 months before the Ninth Circuit's decision in *United States* v. *Prescott*, 581 F.2d 1343 (1978). At the time of the entry, therefore, neither this Court nor the Ninth Circuit had held that under the Fourth Amendment law enforcement officers were required to obtain an arrest warrant before entering a suspect's house to arrest him on probable cause. And, as the Court observed in *Payton* (445 U.S. at 600), the practice of conducting warrantless arrest entries was "longstanding" and "widespread". Indeed, in this very case the panel's first opinion held, at least implicitly, that warrantless arrest entries are lawful if supported by probable cause (Pet. App. 26a-27a). The court of appeals in its final opinion nevertheless held that the principles announced in *Payton* and *Prescott* governed the agents' conduct in this case, and that therefore the evidence obtained following the warrantless entry into respondent's house had to be suppressed.

The decision to apply *Payton* and *Prescott* retroactively to a case such as this one is based on a fundamental misconception of the nature of the Fourth Amendment's exclusionary rule. The principal purpose of the exclusionary rule is to deter unlawful police conduct. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). The rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" *Ibid.*, quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). See *United States* v. *Janis*, 428

U.S. 433, 443 (1976); *Desist* v. *United States*, 394 U.S. 244, 249 (1969); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). Rather, the rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Although the exclusionary rule also has been described as serving the imperative of judicial integrity, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the rule in a particular situation. *Stone* v. *Powell*, *supra*, 428 U.S. at 485.

Furthermore, in the Fourth Amendment context, the price of the exclusionary rule is extremely high. Although a newly announced Fourth Amendment doctrine "raises no question about the guilt of defendants convicted in prior trials" (*Williams* v. *United States*, 401 U.S. 646, 653 (1971) (plurality opinion)), when the exclusionary rule is invoked the result is that relevant, probative evidence is withheld, thus impairing the search for truth. Particularly because the constitutional guarantee against unreasonable seizures is unrelated to the fact-finding function of the criminal trial, this Court has emphasized that "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348.

In recognition of the unique characteristics of the exclusionary rule, this Court held in *United States* v. *Peltier*, 422 U.S. 531 (1975), that neither the deterrent purpose of the rule nor the imperative of judicial integrity justified the suppression of highly probative evidence where law enforcement officers obtained that evidence in good faith compliance with then-prevailing constitutional norms. Under the

standard announced in *Peltier*, the evidence in this case should not be suppressed. No legitimate purpose would be served by excluding the fruits of warrantless arrest entries that occurred prior to *Payton* and *Prescott*, because law enforcement officers conducting those entries did not know, and could not reasonably be charged with knowing, that their actions were proscribed by the Fourth Amendment.

Until *Payton*, this Court had expressly left open the question of the validity of warrantless arrest entries, and the Ninth Circuit did not resolve the question until its decision in *Prescott*. Moreover, that question was one on which the lower courts and commentators had been in sharp disagreement. It would be unrealistic to expect the arresting agents in this case to have predicted the resolution of a difficult, unsettled question of constitutional law and to have acted accordingly. Indeed, if the panel of judges in this very case was initially of the view that a warrant was not required to uphold the arrest entry into respondent's residence, it is difficult, if not impossible, to conclude that the arresting officers should have known of such a requirement.

The Ninth Circuit's conclusion in *United States* v. *Blake*, 632 F.2d 731 (1980), relied upon by the court below, that the result in *Prescott* was "clearly foreshadowed" by dicta in two pre-*Prescott* cases, applies the wrong test for assessing the retroactive application of Fourth Amendment decisions. Under the rationale of *Peltier*, the appropriate question "is not whether lawyers and judges would describe the new decision as [having been clearly foreshadowed], but whether a working patrolman can properly be charged with foreknowledge of the new decision's outcome." *United States* v. *Ross*, 655 F.2d 1159, 1190 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting;

emphasis omitted), cert. granted, No. 80-2209 (Oct. 13, 1981). In short, police conduct cannot be measured by dicta, hints, or precatory judicial observations. In the absence of clear, settled rules, constitutional transgressions will not be sufficiently deterred to justify the high cost of suppressing probative evidence, because the officer will not know that he is trespassing into constitutionally protected areas.

Finally, the fact that respondent's case was pending on direct review when *Payton* and *Prescott* were decided does not entitle respondent to suppression of evidence for violations of the new Fourth Amendment standard established in those cases. The exclusionary rule is not a personal right but a procedural safeguard designed to deter *future* violations. The deterrent purpose of the rule would not be served by suppressing evidence seized as the result of warrantless arrest entries that occurred prior to the announcement in *Payton* and *Prescott* that such entries were unlawful; all that would be accomplished is the discharge of a wrongdoer.

ARGUMENT

THE DECISIONS REQUIRING WARRANTS FOR ARREST ENTRIES INTO SUSPECTS' HOMES SHOULD NOT BE APPLIED TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF ARREST ENTRIES ANTEDATING THOSE DECISIONS

Respondent was arrested inside his home in California on May 5, 1977. The arrest was supported by probable cause[5] but was not authorized by a

[5] The court of appeals assumed that the agents had probable cause to arrest respondent when they went to his house (Pet. App. 4a), and, in light of the information given Agent Hemenway by Lena Kearney and Wynona Wilkins (see page 3, *supra*), there is little basis for disputing that conclusion.

warrant. At the time of the arrest, neither this Court nor the Ninth Circuit had held that a warrant is required before law enforcement officers may enter a suspect's home in order to arrest the suspect on probable cause. On September 14, 1978, more than 16 months after the entry at issue here, the Ninth Circuit concluded in *United States* v. *Prescott*, 581 F.2d 1343, that the Fourth Amendment imposes such a requirement. This Court did not rule on the question until its decision in *Payton* v. *New York*, 445 U.S. 573, issued on April 15, 1980, nearly three years after respondent's arrest. Nevertheless, the court of appeals in this case held that both *Payton* and *Prescott* should be applied retroactively to suppress the fruits of a warrantless arrest entry into respondent's house (Pet. App. 5a-7a, 12a-13a).[6]

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[6] In the course of reaching its conclusion that respondent's admissions should have been excluded as evidence at his trial, the court of appeals relied upon two other propositions that we believe to be erroneous. First, it concluded that the principles of *Payton* extend to the situation in which officers possessing probable cause but no warrant, by ruse or show of weapons, cause a suspect to open the door of his house, thereby placing himself in position to be arrested without any entry into the premises (Pet. App. 7a). In our view, such a situation is governed by the principles of *United States* v. *Watson*, 423 U.S. 411 (1976), and *United States* v. *Santana*, 427 U.S. 38 (1976), upholding warrantless probable cause arrests that do not require an entry into the home, rather than by *Payton*. The gist of *Payton* is not that the home is a sanctuary against warrantless arrests, but rather that the *search* of the home resulting from an arrest entry implicates an independent interest deserving of some form of warrant protection. Accordingly, if an arrest can be effectuated without an entry into the home, the policies served by the decision in *Payton* are not implicated. (Because the present case involved an arrest

The retroactive application of the new Fourth Amendment rule announced in *Payton* and *Prescott* is contrary to this Court's long-established policy of applying the exclusionary rule only where its deterrent purpose is "most efficaciously served." *Stone* v. *Powell*, 428 U.S. 465, 487 (1976); *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Moreover, the decision below is at odds with the principles underlying the line of Fourth Amendment retroactivity cases culminating in *United States* v. *Peltier*, 422 U.S. 531 (1975).

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entry, the discussion of the foregoing issue does not appear to have been essential to the court's decision.)

Second, the court of appeals held that respondent's statements were a suppressible fruit of what it had found to be an illegal entry into his home (Pet. App. 8a-11a). While this perhaps presents a closer issue than the one discussed in the preceding paragraph, we believe the court of appeals' holding on the point is also in error. A correct "fruits" analysis calls for distinguishing between the entry into the home—which, at least after the decisions in *Prescott* and *Payton*, was unlawful—and the arrest itself, which the agents had a right to make by virtue of the information they possessed giving them probable cause to believe respondent had committed a crime. With this critical distinction in mind, it becomes clear that any evidence discovered by virtue of the officers' presence inside an arrestee's home would be a suppressible fruit of the unlawful entry, whereas evidence such as statements or items found on the arrestee's person are properly viewed as fruits of the arrest, not the entry, and should be admissible so long as the arrest was itself authorized by law.

We have, however, not presented either of the foregoing issues in our petition, and they are thus not before this Court. We accordingly assume, for purposes of this case only, that those issues were correctly resolved by the court of appeals.

A. A Decision Resolving A Previously Unsettled Fourth Amendment Issue Should Not Be Applied Retroactively

In *United States* v. *Peltier*, *supra*, the Court held that the policies underlying the exclusionary rule did not require the suppression of evidence seized in searches that concededly were unlawful under the principles announced in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), but that were conducted prior to the date that *Almeida-Sanchez* was decided. The Court noted that new constitutional principles often have been applied retroactively where those principles are directed at remedying a prior practice that impaired the truth-finding function of criminal trials. 422 U.S. at 535. However, the Court also pointed out (*ibid.*; footnote omitted) that

> in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.

The Court in *Peltier* then undertook to explain why it consistently had concluded that decisions expanding the scope of Fourth Amendment rights should be applied prospectively only. It noted that neither of the purposes served by the exclusionary rule—deterrence of unlawful police conduct and preservation of judicial integrity—would be served by giving retroactive effect to decisions announcing new Fourth Amendment standards. Thus, the Court observed that "the 'imperative of judicial integrity'

is * * * not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." 422 U.S. at 537-538 (emphasis omitted). Similarly, the Court noted that " '[w]here the official action was pursued in complete good faith * * * the deterrence rationale loses much of its force' " because it " 'necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct * * *.' " *Id.* at 539, quoting *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).[7] Accordingly, the Court concluded that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was un-

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[7] See also *United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981), where the Fifth Circuit held that

> evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We * * * so [hold] because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also.

While there would appear to be substantial reasons for this Court to adopt a general and relatively broad "good faith" exception to the exclusionary rule in an appropriate case, we do not believe that it is necessary to do so here because respondent's suppression claim can be disposed of by reference to well settled principles that lead directly to the more specific conclusion that new Fourth Amendment rulings are to be applied prospectively only.

constitutional under the Fourth Amendment." 422 U.S. at 542.

The *Peltier* test reflects the view that the conduct of law enforcement officers must be evaluated pragmatically. The officer in the field is often forced to respond quickly to fast-moving, unpredictable events, many of which present potential dangers to the officer or to the public at large. At the same time, while the officer's conduct is circumscribed by the Constitution, he is not a constitutional scholar, and the plain language of the Constitution offers little in the way of specific guidance, "particularly * * * when the constitutional standard is as amorphous as the word 'reasonable.'" *Payton* v. *New York*, *supra*, 445 U.S. at 600.

The Court's approach in *Peltier* is consistent with its earlier decisions addressing the retroactivity issue in the Fourth Amendment context. In each of those cases, the Court concluded that the deterrent purpose of the exclusionary rule would not be served by retroactive application of new constitutional doctrines. See *Linkletter* v. *Walker*, 381 U.S. 618, 636-639 (1965); *Fuller* v. *Alaska*, 393 U.S. 80, 81 (1968); *Desist* v. *United States*, 394 U.S. 244, 249-250, 254 n.24 (1969); *Williams* v. *United States*, 401 U.S. 646, 651-656 (1971) (plurality opinion). Thus, in *Linkletter* v. *Walker*, *supra*, the Court refused to apply retroactively its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which had held that the Fourth Amendment exclusionary rule was applicable in state criminal trials. Noting that *Mapp*'s application of the exclusionary rule to state cases was premised on the "necessity for an effective deterrent to illegal police action" (381 U.S. at 636-637), the Court in *Linkletter* stated that it could

not conclude "that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." 381 U.S. at 637. Likewise, in *Desist* v. *United States*, *supra*, the Court observed that "[t]he exclusionary rule 'has no bearing on guilt' or 'the fairness of the trial,' " and it accordingly "decline[d] to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U.S. at 254 n. 24, quoting from *Linkletter* v. *Walker*, *supra*, 381 U.S. at 638, 639.

The focus in the retroactivity cases on the deterrent purpose of the exclusionary rule echoes the theme of this Court's decisions concerning the application of the rule in a variety of other settings. For example, in *United States* v. *Havens*, 446 U.S. 620 (1980), the Court upheld the use of illegally seized evidence to impeach a defendant's testimony at trial. The Court concluded that the deterrent purpose of the exclusionary rule was adequately served by prohibiting the government from using the evidence to make out its case in chief, and that any increase in deterrence "by forbidding impeachment of the defendant who testifies [is] insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial." *Id.* at 627.

Similarly, in *United States* v. *Calandra*, *supra*, the Court refused to extend the exclusionary rule to bar the admission of illegally seized evidence in grand jury proceedings. In reaching this result, the Court stated (414 U.S. at 351-352; footnote omitted):

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury

> proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. * * * We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

A like analysis was employed in *Stone* v. *Powell*, *supra*, 428 U.S. at 482-495, where the Court held that the substantial costs to society would outweigh any marginal deterrent effect that might follow from application of the exclusionary rule to permit state prisoners to relitigate search and seizure claims in federal habeas corpus proceedings. In *United States* v. *Janis*, 428 U.S. 433, 454 (1976), the Court similarly concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." And in *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969), the Court ruled that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. See *Rakas* v.

Illinois, 439 U.S. 128, 137 (1978); *United States* v. *Payner*, 447 U.S. 727, 735 (1980).[8]

There is even less reason for paying the price of the exclusionary rule in this case than in the cases discussed above. Those cases establish that even if police conduct is plainly and culpably illegal, the exclusionary rule does not bar use of the fruits of that illegality in all situations. Thus, despite the fact that the police in *Linkletter* (and in other pre-*Mapp* cases) could not reasonably have entertained any doubts that their conduct was prohibited by the Fourth Amendment, the Court nonetheless ruled that *Mapp* would not be applied retroactively to exclude the fruits of illegal searches that pre-dated *Mapp*. See *United States* v. *Peltier*, *supra*, 422 U.S. at 538. Surely the policies of the exclusionary rule are even less served by applying it here to conduct the officers had no reason to know was in violation of the Fourth Amendment.

B. The Arresting Agents Were Not Acting In Violation Of Existing Constitutional Standards

As *Peltier* teaches, in determining whether the exclusionary rule requires the suppression of respond-

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[8] In *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), the Court refused to suppress evidence seized incident to an arrest made in good-faith reliance on an ordinance later declared unconstitutional. The Court observed (*id.* at 38 n.3):

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

ent's statements, the critical question is whether the arresting agents knew or should have known on May 5, 1977, that their warrantless entry into respondent's home was in violation of the Fourth Amendment—not whether light is shed on the question by subsequent judicial decisions.

1. Certainly there was nothing in this Court's cases that gave the agents knowledge that their conduct was unlawful. In *Payton* itself the Court noted that the question of warrantless arrest entries "ha[d] been expressly left open in a number of our prior opinions." 445 U.S. at 574. See *United States* v. *Watson*, 423 U.S. 411, 418 n.6 (1976); *id.* at 433 (Stewart, J., concurring); *id.* at 432-433 (Powell, J., concurring); *Gerstein* v. *Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-481 (1971); *id.* at 492 (Harlan, J., concurring); *id.* at 510-512 & n.1 (White, J., dissenting); *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958).[9]

Moreover, the question that this Court left unsettled until *Payton* had been answered in different

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[9] In *Coolidge* v. *New Hampshire*, *supra*, it was stated that "[i]t is clear * * * that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'" 403 U.S. at 477-478. However, the Court found it "unnecessary" to decide whether warrantless arrest entries were unconstitutional. *Id.* at 481. Moreover, Justice Harlan, who concurred "although not without difficulty" (*id.* at 491) in certain portions of the Court's opinion, including the portion containing the above-quoted statement, expressed the view that the Court acted wisely in leaving open the warrantless arrest entry issue. *Id.* at 492.

ways by various state and federal courts, most often in favor of the constitutionality of warrantless arrest entries. The practice of making warrantless arrest entries was described in *Payton* as "longstanding" and "widespread" (445 U.S. at 600), and the Court specifically acknowledged that "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances." *Id.* at 598. In this connection, the Court pointed out that at the time of its decision 24 states permitted warrantless arrest entries, while only 15 states clearly prohibited them. *Id.* at 598-599 & nn. 46-47.[10] Furthermore, the Court noted that the federal courts of appeals were split on the constitutional validity of warrantless arrest entries. *Id.* at 575 & n.4.[11] Finally, the Court also observed that "[t]he common-law commentators disagreed sharply on the subject." *Id.* at 593.

Given this background, it is no exaggeration to state that when Agents Hemenway and Pickering entered respondent's home and arrested him, their actions implicated a perplexing constitutional question that had dramatically divided scholars and jurists alike for many years. Even had they preceded their actions by a diligent study of legal

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[10] This reckoning considerably overstates the number of jurisdictions that prohibited such entries as of May 5, 1977, when the federal agents in this case entered respondent's home. Of the ten state courts that had found such entries unconstitutional at the time of the decision in *Payton*, only three had done so prior to May 1977 (see 445 U.S. at 575 n.3).

[11] Again, only two of the decisions cited by the Court in this footnote as condemning warrantless arrest entries were handed down before the entry in the instant case.

authorities, the agents, who presumably lacked supernatural prescience, could not have discerned the answer that would ultimately be given to this difficult question, about which more learned men had argued for centuries and which sharply divided this Court in its eventual resolution. As the decision in *Peltier* recognizes, police officers should be required to conform their behavior to prevailing constitutional norms. They should not, however, be required to predict correctly the resolution of close and unsettled constitutional questions. The arresting agents in this case could not reasonably be charged with foreknowledge of the outcome of this Court's decision three years later in *Payton*, a result that was by no means a foregone conclusion. Until *Payton* was decided in April 1980, no decision of this Court was in any way intended, or could reasonably have been expected, to deter a police officer from proceeding as Agents Hemenway and Pickering proceeded. Accordingly, under the *Peltier* test, *Payton* v. *New York* should not be applied retroactively to arrest entries that took place prior to April 15, 1980.

2. We acknowledge that an earlier date could appropriately be utilized if the federal court of appeals for the circuit in which the challenged search and seizure took place had authoritatively held the conduct in question unlawful prior to the officers' action in a particular case. This point does not aid respondent, however, for there is no reasonable basis on which the agents could be charged with knowledge of a warrant requirement under the prevailing law of the Ninth Circuit at the time of the entry in May 1977. It was not until 16 months later that the Ninth Circuit concluded, in *United States* v. *Prescott*, *supra*, that absent exigent circumstances law en-

forcement officers must obtain a warrant before entering private premises to effect an arrest.[12] The court in *Prescott* expressly noted that theretofore this Court "ha[d] never resolved this issue" and that the Ninth Circuit itself "ha[d] never decided the question either." 581 F.2d at 1348.

Prior to *Prescott*, the Ninth Circuit had decided a number of cases in which law enforcement officers without warrants had arrested persons in their homes. See *United States* v. *Blake*, 632 F.2d 731, 735 n.1 (9th Cir. 1980). Until 1973, the court focused on whether the officers had probable cause to make an arrest and whether they announced their identity and purpose before entering. See, *e.g.*, *Williams* v. *United States*, 273 F.2d 781 (9th Cir. 1959), cert. denied, 362 U.S. 951 (1960); *Munoz* v. *United States*, 325 F.2d 23, 27 (9th Cir. 1963); *Ng Pui Yu* v. *United States*, 352 F.2d 626, 631 (9th Cir. 1965); *Jack* v. *United States*, 387 F.2d 471, 473 (9th Cir. 1967), cert. denied, 392 U.S. 934 (1968). In 1973 the court stated for the first time that the permissibility of a warrantless arrest entry into a home was an open question. See *Williams* v. *Gould*, 486 F.2d

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[12] Unlike *Payton* or the present case, which involved warrantless entries into the suspects' own homes, *Prescott* involved a warrantless entry into the home of a nonsuspect third party in order to arrest a fugitive who was believed to be inside. But the opinion of the court of appeals in *Prescott* did not differentiate between entries into a suspect's home and entries into a third party's residence. Thus, after *Prescott*, it was tolerably clear that a warrant was required in order to make an arrest entry inside any private dwelling within the Ninth Circuit. See *Payton* v. *New York*, *supra*, 445 U.S. at 575 n.4 (listing *Prescott* among those court of appeals decisions that imposed a warrant requirement on arrest entries into a suspect's residence).

547, 548 (9th Cir. 1973). Soon thereafter, in the course of holding that officers making an arrest entry lacked sufficient grounds for believing the suspect to be on the premises, the court did state in dictum that arrest entries require arrest warrants. *United States* v. *Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974). That this dictum was not regarded as an authoritative disposition of the issue is evident from subsequent cases clearly recognizing the issue as unsettled and avoiding its decision by finding that any error in the admission of evidence was harmless, *United States* v. *Masterson*, 529 F.2d 30, 31 (9th Cir.), cert. denied, 426 U.S. 908 (1976), or that the arrests were justified by exigent circumstances. *United States* v. *McLaughlin*, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *United States* v. *Flickinger*, 573 F.2d 1349, 1354 (9th Cir.), cert. denied, 439 U.S. 836 (1978)[13].

Apparently then, at the time of the entry at issue here, it was common practice among law enforcement officers in the Ninth Circuit to enter private dwellings without a warrant in order to effectuate a felony arrest on probable cause. Indeed, the practice had such widespread acceptance that respondent initially based his suppression claim solely on the issue of probable cause to arrest. He never argued in the district court that the entry was unlawful because the arresting agents lacked a warrant.

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[13] In *United States* v. *Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), without expressing its own view on the question, the court noted the government's concession that a warrantless arrest entry would be unlawful in the absence of exigent circumstances, which it held did not exist on the facts of that case.

Despite this background and the Ninth Circuit's emphasis in *Prescott* that it was deciding a question that had not yet been settled either in the circuit or in this Court, the court of appeals in this case concluded, in reliance on *United States* v. *Blake*, *supra*, that the decision in *Prescott* should be given retroactive effect. Citing *United States* v. *Calhoun*, 542 F.2d 1094 (9th Cir. 1976), and *United States* v. *Phillips*, *supra*, the court in *Blake* had held that the result in *Prescott* had been "clearly foreshadowed," and that therefore the *Prescott* rule would be applied to suppress evidence seized as a result of warrantless arrest entries that pre-dated *Prescott*. The court stated that its decisions in *Calhoun* and *Phillips* "indicated that a warrant very likely was required" to justify an entry into private premises to effect an arrest. 632 F.2d at 735. While acknowledging that neither *Calhoun* nor *Phillips* had actually held that a warrant was required, and that prior to *Prescott* it had "avoided the issue repeatedly either by finding that probable cause to arrest was lacking or, when not lacking, that exigent circumstances existed," the court nevertheless concluded that its "[p]ersistent avoidance" of the issue should have "signalled" to law enforcement officers that the issue might be decided adversely to the government, and that this was sufficient to constitute a clear foreshadowing of the decision in *Prescott*. 632 F.2d at 735-736. In the alternative, the court concluded that because the "fundamental source" for *Prescott*'s holding was the sanctity of the home in England under the common law, "it is unlikely that the pre-*Prescott* 'law' of this circuit can be said to have been other than as stated in *Prescott*." 632 F.2d at 736. The court explained (*ibid.*) that

prior to *Prescott* law enforcement officials knew that this circuit's law was unsettled but that there was some drift toward a warrant requirement. To announce at this late date that prior to *Prescott* there was no warrant requirement would be to refute *Prescott*'s source and to ignore the drift that *Calhoun* and *Phillips* represent.

3. The Ninth Circuit's decision in *Blake* that *Prescott* should be applied retroactively, and the court's retroactive application of *Prescott* to suppress evidence in this case, are plainly wrong. Prior to *Prescott*, borrowing the Ninth Circuit's own words, "there was no holding which gave [federal] law enforcement agencies [in the Ninth Circuit] adequate notice of the unconstitutionality" of warrantless arrest entries. *United States* v. *Escalante*, 554 F.2d 970, 973 (9th Cir.) (en banc), cert. denied, 434 U.S. 862 (1977) (holding decisions prohibiting non-probable-cause searches of vehicles at fixed checkpoints not retroactive).[14] Indeed, in its initial opinion in the

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[14] In 1976, the California Supreme Court held, under the Fourth Amendment and its counterpart in the California constitution, that warrantless arrests within the home are *per se* unreasonable in the absence of exigent circumstances. *People* v. *Ramey*, 16 Cal.3d 263, 275-276, 545 P.2d 1333, 1340-1341, 127 Cal. Rptr. 629, 636-637. Although acknowledging that dicta in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 447-478, and in one of its own cases, *People* v. *Privett*, 55 Cal.2d 698, 703, 361 P.2d 602, 605, 12 Cal. Rptr. 874 (1961), indicated that warrantless arrest entries might be unconstitutional (16 Cal.3d at 272-273, 545 P.2d at 1338-1339, 127 Cal. Rptr. at 634-635), the court in *Ramey* nonetheless held that the new rule imposing a warrant requirement would apply prospectively only, because the California courts in numerous prior cases had assumed the legality of warrantless arrest entries so

instant case the court of appeals upheld the warrantless arrest entry into respondent's house (Pet. App. 26a-27a). If the panel of judges in this very case did not initially believe that the Constitution required a warrant or that Ninth Circuit precedent called for such a result, it would indeed be bizarre to conclude that law enforcement officers in May 1977 should have anticipated and conformed their conduct to the impending evolution of the law.

Thus, the same considerations that impel the conclusion that this Court's decision in *Payton* should not be applied retroactively also establish the error of retroactive application of the Ninth Circuit's decision in *Prescott*. Because the arresting agents in this case did not know, and could not reasonably be charged with knowledge, that their actions violated the Fourth Amendment, the evidence they obtained was properly admitted at respondent's trial.[15]

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long as probable cause was present. 16 Cal.3d at 276 n.7, 545 P.2d at 1341 n.7, 127 Cal. Rptr. at 637 n.7.

This Court has remarked on several occasions that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *United States* v. *Di Re*, 332 U.S. 581, 589 (1948). See *Miller* v. *United States*, 357 U.S. 301, 305 (1958); *United States* v. *Watson*, *supra*, 423 U.S. at 420-421 n.8. However, this rule is concerned only with whether the officer has affirmative authority to make an arrest, not whether his actions in making an arrest are permissible under the Fourth Amendment. Thus, the state court decision in *Ramey* was not binding on the actions of federal agents who operated within the state. Moreover, the issue in arrest entry cases is not whether the arrest itself is constitutional without a warrant, but whether the entry of a private dwelling to effect an arrest is an unlawful search. As the court of appeals noted in *Prescott*, "federal law, not state law, is controlling" on the question of the validity of warrantless arrest entries. 581 F.2d at 1348.

[15] In *United States* v. *Corcione*, 592 F.2d 111, 118 (2d Cir.), cert. denied, 440 U.S. 975 (1979), the Second Circuit refused

The principal defect in the Ninth Circuit's analysis in *Blake*, which was relied on in this case, is that it "confuse[s] the test to be applied in retroactivity cases not involving the exclusionary rule with the standard the *Peltier* decision set forth to be applied in exclusionary rule cases." *United States* v. *Ross*, 655 F.2d 1159, 1188 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting), cert. granted, No. 80-2209 (Oct. 13, 1981).[16] See *United States* v. *Tucker*, 610 F.2d 1007, 1014 (2d Cir. 1979) (Van Graafeiland,

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to apply retroactively its decision in *United States* v. *Reed*, 572 F.2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978), which had imposed a warrant requirement for arrest entries. The court in *Corcione* concluded that the deterrent purpose of the exclusionary rule would not be served "where police officers obtained the evidence in good faith prior to the announcement of the new constitutional principle." 592 F.2d at 118.

The good faith of the arresting agents in this case cannot seriously be questioned. The agents went to respondent's house with the intention of questioning him about his involvement in the check cashing scheme. The agents had obtained an arrest warrant for co-defendant Dodd even though no warrant was needed to arrest Dodd in a public place and neither this Court nor the Ninth Circuit had held that a warrant was required before entering a suspect's home in order to arrest him.

[16] The petition in *Ross* presented only an unresolved substantive Fourth Amendment issue regarding the application of the warrant requirement to the probable cause search of a paper bag seized from an automobile. The issue of the retroactivity of *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), discussed at some length in the majority opinion and in Judge Wilkey's dissent in *Ross*, is not before this Court. As is evident from the discussion in the text, we agree with Judge Wilkey's excellent and thorough analysis of retroactivity principles.

J., dissenting).[17] As Judge Wilkey explained in *United States* v. *Ross*, *supra*, 655 F.2d at 1188-1189 (emphasis in original; footnotes omitted):

> In situations *not* involving the retroactive application of the exclusionary remedy, a decision is limited to prospective application only if it meets each of two tests. The first of these two is a threshold test which quickly eliminates those new substantive decisions that should not seriously be considered for limitation to prospective effect. This first test was set out by the Supreme Court in *Chevron Oil Co.* v. *Huson* [404 U.S. 97 (1971)], in which the Court stated that a case must decide "an issue of first impression whose resolution was not clearly foreshadowed" [*id.* at 106] before the rule of the case can seriously be considered for prospective application only.
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> Unless the new decision meets the threshold requirements of the *Chevron Oil* test, it is ineligible for full-blown consideration for limitation to prospective application. If it meets the threshold standards, further consideration is then guided by the three factors set forth in the Supreme Court's decision in *Stovall* v. *Denno* [[388 U.S. 293, 297 (1967)]: (1) the purpose of the new result; (2) the extent to which law enforcement officials may have relied on the previous law; and (3) the impact of retroactivity on the administration of justice.

In *Peltier*, however, this Court rejected this two-step analysis in considering whether new Fourth

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[17] See also Note, *Retroactivity And The Exclusionary Rule: When Do The Policies Underlying The Exclusionary Rule Warrant Its Retroactive Application?*—United States v. Peltier, *422 U.S. 531 (1975)*, 13 Am. Crim. L. Rev. 317, 329 (1975).

Amendment decisions should be applied retroactively. The Ninth Circuit in *Peltier* had divided over whether this Court had "articulated a new doctrine" in *Almeida-Sanchez*. See *United States* v. *Peltier*, *supra*, 422 U.S. at 533-534. The dispute in the court of appeals turned on whether *Almeida-Sanchez* had "reaffirmed well-established Fourth Amendment standards" or had "disturb[ed] a long-accepted and relied-upon practice." *United States* v. *Peltier*, 500 F.2d 985, 988 (9th Cir. 1974) (en banc), rev'd, 422 U.S. 531 (1975). The focus of this Court's analysis in *Peltier*, however, was not on whether *Almeida-Sanchez* made new law, but on whether "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542.[18]

Even before *Peltier*, this Court in *Desist* v. *United States*, *supra*, had rejected the argument that it

[18] We recognize that *Peltier* may perhaps be distinguished from this case on the ground that the law enforcement conduct in that case was carried out "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" (422 U.S. at 541), whereas here the agents' actions were not expressly authorized by statute and there was no recent history of affirmative judicial approval of such actions by the Ninth Circuit. But this distinction should not lead to a different result. Regardless whether a new Fourth Amendment decision actually changes prior law, answers a previously unsettled question, or reaches a result "foreshadowed" (but not yet conclusively established) by earlier decisions, the substantial costs to society outweigh whatever minimal deterrent benefit might result from excluding reliable evidence obtained by law enforcement officers in the course of a search or seizure that is established to have been unlawful only by subsequent decisions.

should give retroactive effect to its decision in *Katz* v. *United States*, 389 U.S. 347 (1967), because the result in *Katz* had been "clearly foreshadowed." The Court in *Desist* noted that "[w]hile decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance, the Court consistently reiterated those tests and declined invitations to abandon them." 394 U.S. at 248 (footnote omitted). Thus, "[h]owever clearly [the] holding in *Katz* may have been foreshadowed" (*ibid.*), the Court in *Desist* concluded that *Katz* would not be applied retroactively because the deterrent purpose of the exclusionary rule "overwhelmingly supports nonretroactivity." *Id.* at 251.

Accordingly, the Ninth Circuit in *Blake* erred in basing its retroactivity inquiry on whether the result in *Prescott* had been "clearly foreshadowed." "The appropriate question to ask * * * is not whether lawyers and judges would describe the new decision as [having been clearly foreshadowed], but whether a working patrolman can properly be charged with foreknowledge of the new decision's outcome." *United States* v. *Ross*, *supra*, 655 F.2d at 1190 (Wilkey, J., dissenting; emphasis omitted).[19]

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[19] In any event, as we have shown above and as the *Prescott* panel acknowledged (581 F.2d at 1348), the result in *Prescott* was not clearly foreshadowed by the dicta in earlier Ninth Circuit cases any more than *Payton* was foreshadowed by the dictum in *Coolidge* v. *New Hampshire*, *supra*. Before *Prescott* the law in the Ninth Circuit, even under the view of the *Blake* panel, was "unsettled," although there was "some drift" toward a warrant requirement. 632 F.2d at 736. By holding that law enforcement officers in the Ninth Circuit should have caught this "drift," the court in *Blake* and in this case disregarded the *Peltier* test for assessing retroactivity questions in the context of the exclusionary rule.

The Ninth Circuit in *Blake* also erred in concluding (632 F.2d at 736) that the "law" that existed in the circuit prior to *Prescott* was no different from that announced in *Prescott*. This approach stems from the common law notion that "the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter* v. *Walker*, *supra*, 381 U.S. at 622-623, quoting from 1 Blackstone, *Commentaries* 69 (15th ed. 1809). But this Court has "firmly rejected the idea that *all* new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." *Williams* v. *United States*, *supra*, 401 U.S. at 651 (plurality opinion) (emphasis in original).

In short, police conduct cannot be measured by dicta, hints, or precatory observations. It is difficult enough for law enforcement officers to keep abreast of established doctrine in the Fourth Amendment area, which is one of the most rapidly changing areas of the law. To expect officers to be familiar with, and conform their conduct to, subtle judicial nuances in the treatment of unsettled issues is entirely unreasonable.

Accordingly, the retroactivity of principles announced in a Fourth Amendment decision should be governed by whether the officer may properly be charged, prior to the time that decision was rendered, with knowledge that his actions were unlawful. In the absence of clear, straightforward rules, constitutional transgressions will not be effectively deterred, because the officer will have no reasonable way of knowing that he is trespassing into constitutionally protected areas.[20] Now that *Payton* has been decided,

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[20] This is not to suggest that police departments or other law enforcement agencies may not, as a matter of policy, require their officers to adhere to standards of conduct more

a clear rule has been established, and law enforcement officers may henceforth properly be charged with knowledge that warrantless arrest entries are prohibited in the absence of exigent circumstances. If, in the future, an officer disregards the *Payton* warrant requirement, the evidentiary fruits of his entry will be suppressed at trial. Knowledge of this consequence will (if the premise of the exclusionary rule is sound), deter unlawful arrest entries. But no purpose of deterrence will be served by applying the Fourth Amendment doctrine of *Payton* and *Prescott* to suppress evidence obtained as a result of arrest entries conducted prior to those decisions. As Judge Wilkey remarked in *United States* v. *Ross*, *supra*, 655 F.2d at 1192:

> Under these circumstances, suppressing the evidence [the agents obtained] is nothing short of levying an *ex post facto* penalty on utterly blameless police work undertaken in the line of duty. Suppressing the evidence in this case cannot deter the police from doing what they have no way of knowing is wrong. * * * The [court of appeals' decision] does not deter the constable from blundering by liberating the criminal. It simply liberates the criminal.

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stringent than those that are constitutionally required. See *United States* v. *Caceres*, 440 U.S. 741, 751 (1979). In fact, subsequent to the 1978 decision of the Second Circuit holding warrantless arrest entries unlawful in *United States* v. *Reed*, *supra*, the Justice Department instructed federal law enforcement agencies that they should follow the practice of procuring arrest warrants prior to entering a suspect's home to arrest him in the absence of exigent circumstances. But the failure to adopt such initiatives should not lead to the suppression of evidence where the agencies and their officers are attempting to adhere in good faith to established constitutional standards.

For those law enforcement agencies and officers who are exceptionally sensitive to deterrence by applications of the exclusionary rule, it may be argued that retroactive application of decisions like *Payton*, which resolve previously unsettled issues, will influence their conduct by deterring any actions that are not settled as being lawful. This will have the effect of causing officers to eschew both legal and illegal searches or seizures (much as overbroad statutes regulating speech activities operate to deter both constitutionally protected and unprotected behavior). While such scatter-shot deterrence will reap some benefits, it will also incur substantial costs. Even under the most positive view of the benefits of the exclusionary rule as an empirically effective mechanism for protecting the constitutional rights of the citizenry, the incremental value of deterring behavior of possible but questionable legality hardly justifies the costs of such a policy, especially when it is considered that the period of uncertainty as to any type of search and seizure activity will last only until an instance of such conduct is challenged in court and the issue is judicially resolved.

C. The Fact That Respondent's Case Was Pending On Direct Review When *Payton* And *Prescott* Were Decided Does Not Justify Suppression Of The Evidence Against Him

The exclusionary rule is a procedural safeguard implemented in an effort to prevent future Fourth Amendment violations. It is not a personal right to which respondent can lay claim. See *United States* v. *Peltier*, *supra*, 422 U.S. at 538; *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Its deterrent purpose requires that any inquiry concerning implemen-

tation of the rule focus on "the time of the search, not any subsequent point in the prosecution." *Desist* v. *United States*, *supra*, 394 U.S. at 253. See *Hill* v. *California*, 401 U.S. 797, 802 (1971); *Williams* v. *United States*, *supra*, 401 U.S. at 651-652 (plurality opinion). No purpose of deterrence would be served by giving the benefit of the exclusionary rule to those who were victims of warrantless arrest entries that occurred prior to the time that this Court in *Payton*, or a controlling lower court that anticipated *Payton*, announced that such entries were unlawful. All of those unlawful entries are past history; "the ruptured privacy of the victims' homes * * * cannot be restored." *Linkletter* v. *Walker*, *supra*, 381 U.S. at 637. Moreover, the exclusion of reliable, probative evidence clearly undermines the factfinding objective of the criminal trial. See *Desist* v. *United States*, *supra*, 394 U.S. at 250. Accordingly, whatever may be the rule with respect to the retroactivity of other kinds of constitutional decisions (see, *e.g.*, *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977)), the pendency of a case at trial or on direct appeal should have no bearing on the retroactivity of newly decided Fourth Amendment principles.

Nor is it of any significance, with respect to the retroactivity issue, that following the decision in *Payton* the Court vacated the judgments in a number of cases and remanded those cases to the lower courts for further consideration in light of *Payton*. See, *e.g.*, *Brown* v. *Florida*, 446 U.S. 902 (1980); *Bush* v. *Florida*, 446 U.S. 902 (1980). The Court's summary vacation and remand orders said nothing about the subject of *Payton*'s retroactivity, and we submit that it would be improper to conclude that those orders should have the same effect as an explicit deci-

sion by this Court on the merits of the retroactivity issue. Any such conclusion is directly contrary to *Bowen* v. *United States*, 422 U.S. 916 (1975), where this Court refused to give retroactive effect to its decision in *Almeida-Sanchez* v. *United States*, *supra*, notwithstanding the fact that it previously had vacated the judgment in Bowen's case and remanded for reconsideration in light of *Almeida-Sanchez*. Relying on its decision in *Peltier*, which refused to apply *Almeida-Sanchez* retroactively even though Peltier's direct appeal was pending on the date of the decision in *Almeida-Sanchez*, this Court concluded that the reasons that dictated a holding of nonretroactivity in *Peltier* compelled a similar result in *Bowen*. 422 U.S. at 918. See *United States* v. *Stewart*, 650 F.2d 178, 179-180 (9th Cir. 1981); *United States* v. *Ross*, *supra*, 655 F.2d at 1191-1192 (Wilkey, J., dissenting).

Finally, nothing in this Court's decision in *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981), holding that police officers must obtain a search warrant before searching for the subject of an arrest warrant in the home of a nonsuspect third party, suggests that *Payton* should be applied retroactively.[21] While the search in *Steagald* antedated the decision in *Payton*, the Court's opinion makes no reference to retroactivity considerations. Moreover, the substantive Fourth Amendment question presented in *Stea-*

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[21] We have recently filed a petition for a writ of certiorari seeking review of a decision of the Seventh Circuit that applied *Steagald* retroactively to exclude evidence found in the search of a third party's residence that took place prior to the decisions in *Steagald* and *Payton*. *United States* v. *Gillespie*, No. 81-879 (filed Nov. 10, 1981).

gald was quite different from the question that was before the Court in *Payton*. Thus, as we conceded in our brief in *Steagald* (79-6777 U.S. Br. 12, 26), even if the Court in *Payton* had not adopted an arrest warrant requirement for entries into a suspect's own house, it could still logically have required the police to secure search warrants before searching for a suspect in a third party's residence. Accordingly, in reaching the merits of the petitioner's Fourth Amendment claims, the Court in *Steagald* merely followed its general practice in criminal cases of applying a new constitutional ruling to the litigant in whose case it was announced. "Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [litigants] the benefits of * * * decisions" announcing new rules. *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967) (footnotes omitted). Accordingly, the Court's substantive holding in *Steagald*, and its silence with respect to the question of *Payton*'s retroactivity, should not be construed as an implicit acceptance of the proposition that the principles announced in *Payton* should be applied retroactively.

In sum, we submit that, consistent with this Court's practice, only the victims of warrantless arrest entries that occur after April 15, 1980, should receive the benefit of the Fourth Amendment principle announced in *Payton*, absent controlling authority establishing a similar rule in the jurisdiction in question. In the Ninth Circuit, only the victims of warrantless arrest entries occurring after September 14, 1978, should benefit from the holding of *Prescott*.

Because the entry into respondent's house occurred before *Payton* and *Prescott* advised law enforcement officers of the need for a warrant, respondent's post-arrest confessions were properly admitted into evidence at trial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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